



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In the Matter of the Estate of)
FRANCIS J. DOUGHERTY, SR.,) C.A. No. 9694-JL
deceased.)

Submitted: April 5, 2016
Decided: July 22, 2016

MEMORANDUM OPINION

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Attorney for Elizabeth Dougherty.

James J. Haley, Jr., Esquire, of FERRARA & HALEY, Wilmington, Delaware;
Attorney for Patricia Dougherty Zebley, individually.

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AUSTIN TARLOV & MONDELL, P.A., Wilmington, Delaware; Attorneys for
the Estate of Francis J. Dougherty, Sr. and Patricia Dougherty Zebley, in her
capacity as Executrix.

LeGROW, Judge¹

¹ Sitting as a Vice Chancellor by designation under Del. Const. art. IV, § 13(2).

Undue influence, as it relates to testamentary decisions, can take many forms. In addition to formulaic efforts to bend the will of a susceptible testator through threats, intimidation, or fear, undue influence also may, as it did in this case, appear in the form of one person poisoning the mind of a weakened testator by prevailing on his sense of need and gratitude, coupled with efforts to isolate the testator from other relationships. Indeed, the perpetrator may well believe that she is doing the right thing and helping the testator achieve what he truly intends. Nonetheless, when the record indicates that a testator's free will was overcome by excessive pressure, such that he executed a testamentary plan that spoke another's mind, rather than his own, this Court necessarily must conclude that the will is invalid.

In some ways, this case is a fairly prototypical will contest. It is complicated, however, by mental illness suffered by the testator's wife, unusual family dynamics, and subtle motivations of, and actions by, the respondent, who, I conclude, pressured her father to execute a will that primarily benefited her. After her father's death, when she realized the will she procured would not achieve her objective of maintaining control of her parents' real estate, the respondent improperly utilized a power of attorney granted by her mother to place the real estate in an irrevocable trust that named the respondent as trustee and beneficiary. This effort, perhaps more than any other, confirms the respondent's motivations

and her capacity to act improperly to achieve her ends. However justified the respondent believes her actions were, they render the challenged will invalid as the product of undue influence. The respondent also must account for expenditures she made from her parents' accounts. This is my post-trial opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A. Francis and Elizabeth Dougherty

These are the facts as I find them after trial. Francis Dougherty, Sr. ("Francis")² and his wife, Elizabeth Dougherty ("Elizabeth," and collectively with Francis, "the Doughertys"), married on June 13, 1953. The Doughertys had seven children: Francis Dougherty, Jr. ("Frannie"), Elizabeth Ann Dougherty ("Betty Ann"), Respondent³ Patricia Zebley ("Patricia"), Catherine Baldwin ("Cathy"), Mary Krout ("Mary"), Ann Golkov ("Ann"), and Marguerite Montason ("Maggie"). The Doughertys resided for most of their marriage at a home they owned at 710 Phillips Avenue in Wilmington, Delaware ("710 Phillips").

After serving in the Navy, Francis worked as a plumber until he retired. Francis also was a devoted volunteer fireman for most of his adult life. In 1974, Francis was injured seriously while fighting a fire. He was hospitalized for a

² Because certain of the parties share the same last name, I use the family members' first names for clarity and consistency. No disrespect is intended.

³ Technically, this case involves "Respondents:" Patricia in her individual capacity and Patricia in her capacity as the executrix of Francis J. Dougherty, Sr.'s estate. For clarity, I refer to the "Respondent" throughout this opinion when referring to Patricia in both capacities.

month and required rehabilitation and care for a period of time, which Elizabeth provided. He ultimately recovered and returned to plumbing and firefighting.

Elizabeth worked in retail before she married and later owned an antiques shop, which closed in approximately 1980. By all accounts, both Francis and Elizabeth were private people who spent most of their day engaging in separate activities. After he retired, Francis typically spent the majority of his day at the firehouse, which was within walking distance of 710 Phillips.

B. The properties

Francis and Elizabeth had interests in three properties at the time of the events relevant to this action. They owned 710 Phillips, along with another home in Wilmington, located at 2036 Marsh Road (“2036 Marsh”), as tenants by the entirety.⁴ Francis and Elizabeth never lived at 2036 Marsh; they purchased the home as a residence for their daughter, Maggie, and her family.⁵ Patricia contends it was Elizabeth’s idea to purchase 2036 Marsh for Maggie and that Elizabeth coerced Francis into the purchase.⁶ Maggie and her family lived in the house for more than a decade without paying rent to Elizabeth or Francis.⁷

In addition to the two homes in Wilmington, Francis and Elizabeth may have had an interest in a beach cottage on Lot 253 on River Road in Millsboro,

⁴ Pre-Trial Order ¶ 2(H).

⁵ Trial Transcript (hereinafter “Tr.”) Vol. I at 251-52 (Patricia).

⁶ *Id.* at 252-53 (Patricia).

⁷ *Id.* at 253-54 (Patricia).

Delaware (the “Beach Cottage”), but the nature of that interest is unclear and disputed.⁸ The Doughertys’ daughter, Mary, lived at the Beach Cottage for a number of years, and Francis and Elizabeth paid the lot rent for the house.⁹

C. Francis’s health

Witnesses described Elizabeth and Francis as very private and independent.¹⁰ One of Francis’s friends and fellow firefighters, Richard Perillo (“Mr. Perillo”), described Francis as “stubborn as hell,” except when it came to Elizabeth.¹¹ To Mr. Perillo, Francis seemed to be almost “afraid” of Elizabeth, and Mr. Perillo testified that Francis once confided that he remained married only because it was too expensive to obtain a divorce.¹² Although Respondent relies on Francis’s unhappiness and fear of his wife as evidence of why he may have attempted to disinherit her, the evidence cuts both ways, suggesting also that Francis may have had a disposition to be subservient or submissive to whomever was in a role of caring for him.

In addition to a variety of physical conditions from which he suffered, a number of physicians had raised concerns regarding Francis’s mental health at the

⁸ Compare Post-Tr. Answering Br. of Resp’ts, the Estate of Francis J. Dougherty, Sr., and Patricia D. Zebley, in her capacity as Executrix (hereinafter “Estate Post-Tr. Br.”) at 14-15 (alleging that neither Francis nor Elizabeth had any ownership interest in the Beach Cottage), with Resp’t Patricia Zebley’s Post-Tr. Answering Br. (hereinafter “Patricia Post-Tr. Br.”) at 3 (alleging that Francis had “an interest” in the Beach Cottage).

⁹ Tr. Vol. III at 673-75 (Mary).

¹⁰ *Id.* at 620 (Elizabeth), 678 (Mary).

¹¹ *Id.* at 580 (Perillo).

¹² *Id.*

time of the events at issue in this litigation. Francis's primary care physician, Dr. David Estock, testified that he saw Francis regularly and had no concerns regarding his communications or comprehension.¹³ Some of Dr. Estock's records, however, reflect a diagnosis of "mild dementia" and indicate Francis was experiencing "memory issues."¹⁴ Dr. Ramnik Singh, a psychiatrist who examined Francis on July 15, 2011, diagnosed him with depression, but indicated his cognitive and executive functioning was normal and appropriate.¹⁵ Dr. Singh's report acknowledged Francis had some decreased memory, but it did not indicate further testing was required.¹⁶

In contrast, however, Dr. Lee Dresser, a neurologist, diagnosed Francis with "mild dementia" in May 2010 and recommended an MRI of his brain and additional blood tests.¹⁷ Dr. Dresser's notes indicate Francis had difficulty recognizing and naming his children and grandchildren, and Francis scored below-normal on a cognitive assessment administered by Dr. Dresser.¹⁸ Dr. Dresser also observed some "cognitive dysfunction" upon his examination of Francis.¹⁹

Francis's medical records indicate that he was observed in 2010 and 2011 by other physicians who diagnosed him with mild dementia, confusion, and abnormal

¹³ Dep. of David Estock, M.D. at 44-45, 50, 55-57.

¹⁴ *Id.* at 36-39.

¹⁵ Dep. of Ramnik Singh, M.D. at 20-22.

¹⁶ *Id.* at 22-23.

¹⁷ Joint Ex. (hereinafter "JX") 17.

¹⁸ *Id.*

¹⁹ JX 19 at ESTOCK281.

consciousness and believed he should be considered for a neurological evaluation.²⁰ Dr. Dresser informed both Patricia and Elizabeth of Francis's dementia diagnosis, but Patricia did not believe Francis had dementia and testified she never saw him exhibit any signs of mental decline.²¹ Given her interests in this litigation, however, that testimony does not overcome the contemporaneous medical records or the information Francis and Elizabeth gave to doctors charged with Francis's care.²²

D. The events of March 28, 2011

On March 28, 2011, Francis began vomiting, became incoherent, and was unable to walk. Elizabeth discovered him in the upstairs bathroom of 710 Phillips. Exactly what happened next is disputed. Elizabeth contends she called 911; Mr. Perillo testified he called 911 after Patricia called him.²³ Either way, Patricia and Mr. Perillo entered 710 Phillips and discovered that Elizabeth and Francis had been living for years in conditions that nearly defy description.

Although Patricia had been assisting both her parents with transportation to various appointments, she had not been inside 710 Phillips in decades.²⁴ When she

²⁰ Tr. Vol. I at 132-34 (Romirowsky).

²¹ JX 17; Tr. Vol. I at 36-37 (Patricia).

²² For example, Patricia vaguely suggests that reports that Francis was having difficulty with his memory must have been given to doctors by Elizabeth and are unworthy of credence. Patricia does not suggest why Elizabeth, knowing nothing of Francis's estate planning, would have been motivated to lie to Francis's doctors, or why Francis would have tolerated her doing that.

²³ See Tr. Vol. III at 580-84 (Perillo), 621 (Elizabeth).

²⁴ Tr. Vol. I at 245 (Patricia).

finally entered the house on March 28, 2011, she discovered a home that most would consider unlivable. Elizabeth, although conceding the home was “cluttered” and difficult to navigate, continued to maintain at trial that the clutter merely was a collection of antiques she intended to use to open a new antiques shop.²⁵ Mr. Perillo’s testimony and photographs taken by Patricia tell a different and more believable story. The living conditions, and Elizabeth’s dissembling explanation of them, strongly suggest she suffers from her own mental illness.

When Patricia, Mr. Perillo, and Francis’s fellow firefighters attempted to enter the home, they could not initially gain entry through the front door; clutter prevented it from opening fully.²⁶ The stairs leading to the second floor were so cluttered that Mr. Perillo had to throw items to the side to make a path for the firefighters and the chair that emergency medical personnel used to carry Francis from the home.²⁷

When Patricia began attempting to rehabilitate 710 Phillips after her father’s collapse at the home, she discovered the true extent of the deplorable conditions in which her parents had been living.²⁸ Neither the kitchen nor the showers were operational. An unaddressed leak in a bathroom had caused sewage to leak into

²⁵ Tr. Vol. III at 629 (Elizabeth).

²⁶ Tr. Vol. I at 259-60 (Elizabeth); Tr. Vol. III 583 (Perillo).

²⁷ Tr. Vol. III at 581-82, 584-85 (Perillo).

²⁸ See generally photographs at JX 5.

and rot the floors. Garbage and debris were piled to the ceiling in the kitchen.²⁹ The refrigerator and cabinets were filled with rotting food, roaches and vermin had infested the house, and none of the rooms could be entered due to the piles of things in the home.³⁰ The room in which Francis was living had mold, and he slept on a mattress with holes.³¹ It took Patricia at least six months to clean out the house, and she filled at least four dumpsters with trash, while placing other items in storage or donating them to charity.

For an unknown period of time, Elizabeth and Francis had lived at the property without a working refrigerator or shower. Francis showered daily at the firehouse and would bring home a bag of ice each day to place in a cooler outside the door to their house. That cooler was used to keep their food. On the morning he collapsed, Francis was eating a bowl of cereal in the bathroom. Patricia blamed Elizabeth solely for the condition into which 710 Phillips had devolved.³²

E. Patricia takes “responsibility” for Francis’s and Elizabeth’s wellbeing and finances

After he saw the condition of 710 Phillips, Mr. Perillo contacted New Castle County officials, who in turn told Patricia that her parents could not return to 710 Phillips and that County personnel would find alternate housing for them unless a

²⁹ Tr. Vol. I at 278 (Patricia).

³⁰ *Id.* at 276-80 (Patricia).

³¹ *Id.* at 282 (Patricia).

³² *Id.* at 29-30 (Patricia).

family member would house them.³³ With some trepidation, Patricia agreed to take responsibility for her parents' housing and care, and she began developing a plan to clean out and rehabilitate their home so they eventually could return to it.

Patricia testified that, when she communicated her plan to her father, he cried with relief and expressed deep gratitude to her.³⁴ Elizabeth and Francis promptly moved into Patricia's home in Kennett Square, where she lived alone. Patricia's financial situation at this time was fairly precarious. She had been retired since 2007 and, though not formally divorced, she had been separated for many years. When Patricia retired, she had approximately \$50,000 in savings, but those funds had been depleted by 2011. Patricia relied on her estranged husband for financial support, along with money she earned providing services to elderly friends.

Patricia's relationship with her father, both in 2011 and before that time, was fairly strong, but she expressed a great deal of dislike for, and mistrust of, her mother. Patricia held a nearly reverent view of her father; she "totally respected" him and viewed him as the victim of her mother's abuse and psychiatric issues.³⁵ Patricia voiced this view both to her father and to others while he was present, suggesting to him that he divorce Elizabeth and advising her father's doctors that

³³ *Id.* at 265-66 (Patricia).

³⁴ *Id.* at 270 (Patricia).

³⁵ *Id.* at 48-50 (Patricia); Tr. Vol. II at 435 (Patricia); Tr. Vol. III at 740 (Egli).

Elizabeth was abusive of Francis.³⁶ In contrast, there was a “lack of warmth” between Patricia and Elizabeth – Patricia viewed Elizabeth as ungrateful and unappreciative of Patricia’s efforts, and characterized her interactions with Elizabeth as a “battle” with the “enemy.”³⁷

When her parents were living with her, Patricia helped both of them, particularly her father, with medications and medical appointments.³⁸ Francis executed a power of attorney in 2012, appointing Patricia as his attorney-in-fact, which allowed Patricia formally to access and control the bulk of the Doughertys’ finances.³⁹ Those finances included Francis and Elizabeth’s joint bank account at M&T Bank, credit cards, and a \$75,000 home equity line of credit that Francis and Elizabeth obtained, at Patricia’s urging, to address the issues at 710 Phillips and their other properties.⁴⁰ Even before Francis executed the power of attorney, Patricia exerted primary control over the line of credit, deciding what to pay and writing out almost all the checks herself, some of which Francis signed.⁴¹ In 2012, Francis opened a new account at TD Bank, which he solely funded but which was titled jointly with Patricia. Patricia admits she used this account at times to pay her

³⁶ Tr. Vol. I at 49-51 (Patricia).

³⁷ *Id.* at 114-15, 284 (Patricia); Tr. Vol. III at 741 (Egli).

³⁸ Tr. Vol. I at 27-28 (Patricia).

³⁹ JX 36.

⁴⁰ Tr. Vol. I at 54-57 (Patricia).

⁴¹ *Id.* at 54-56 (Patricia).

personal expenses.⁴² She withdrew a substantial amount of cash from the line of credit, which she testified primarily was used to pay certain vendors who were willing to work at a discount in exchange for cash. Patricia also began using the Doughertys' car after her car broke down.⁴³

F. Patricia works to “put out fires” at the properties

The work Patricia oversaw rehabilitating 710 Phillips was substantial. In addition to major electrical and plumbing repairs and exterminating the infestations, the contractors repaired walls, tore out and renovated the kitchen and bathrooms, replaced all the windows and the back porch, repointed the brick, and painted the house.⁴⁴ Patricia also sorted through her parents' belongings, disposed of items that were ruined by mice or other vermin, and stored in two garages those things of value that could be salvaged.⁴⁵

In addition to the work at 710 Phillips, the Doughertys received notice in the summer of 2011 that a hearing would be held regarding code violations at the Beach Cottage.⁴⁶ In June 2011, before the hearing, Patricia, Francis, and Elizabeth visited the Beach Cottage, where they observed a hole in the roof and damage to the walls and insulation caused by squirrels. Back rent also was owed to the lot

⁴² *Id.* at 62 (Patricia).

⁴³ *Id.* at 57 (Patricia).

⁴⁴ Tr. Vol. II at 470-482 (Patricia).

⁴⁵ *Id.* at 483-88 (Patricia).

⁴⁶ *Id.* at 404-07 (Patricia).

owner.⁴⁷ To address the code violations, Patricia oversaw work to rebuild walls and replace the roof and windows, along with other, more minor, tasks.⁴⁸

In August 2012, Patricia and the Doughertys also became aware of the deteriorating condition of the home at 2036 Marsh through a series of code violations issued for the property.⁴⁹ Patricia and Elizabeth inspected the property with a contractor, who discovered mold in the kitchen, bedrooms, bathrooms, and basement of the home, holes in the main roof of the structure, a collapsed garage roof, and an abandoned well on the property.⁵⁰ Francis allegedly expressed a desire to rehabilitate and sell 2036 Marsh, while Elizabeth – according to Patricia – obstructed those efforts at every turn.⁵¹ Patricia also met with resistance from her sister Maggie and her family, who continued to live at the property, even in its unsafe condition. Patricia therefore undertook to evict Maggie and her family from 2036 Marsh.⁵²

That process took more than a year because Elizabeth refused to go to court to pursue the eviction.⁵³ Patricia eventually convinced Elizabeth to sign a power of attorney appointing Patricia as Elizabeth's attorney-in-fact.⁵⁴ Patricia had this

⁴⁷ *Id.* at 404-07 (Patricia).

⁴⁸ JX 5; Tr. Vol. II at 409-15 (Patricia).

⁴⁹ JX 32, 33; Tr. Vol. II at 415 (Patricia).

⁵⁰ JX 5; Tr. Vol. II at 417-25 (Patricia).

⁵¹ Tr. Vol. II at 426-28 (Patricia).

⁵² *Id.* at 428-29 (Patricia).

⁵³ *Id.* at 434-35 (Patricia).

⁵⁴ JX 37.

document drafted, brought it home to the house in Kennett Square, and had Elizabeth sign the document while Patricia's neighbors served as witnesses.⁵⁵ Although Patricia concedes the power of attorney was intended to facilitate the eviction action, it was a general power of attorney that authorized Patricia to act on Elizabeth's behalf on other matters, including financial decisions.⁵⁶ Patricia acknowledged she understood her fiduciary obligations as Elizabeth's agent.⁵⁷

G. Francis's health continues to decline

Francis's health continued to decline after he and Elizabeth moved in with Patricia. He experienced some fainting spells while at Patricia's house, and in May 2012, he fell and hit his head in Patricia's bathroom. This episode resulted in his admission to Wilmington Hospital, followed by two months of rehabilitation at Kentmere Nursing Home.⁵⁸ Francis also exhibited respiratory problems. In December 2012, Francis began coughing and wheezing. Follow-up studies revealed that he had mesothelioma.⁵⁹ After consulting with his doctor, Francis decided not to pursue treatment for the mesothelioma.⁶⁰ After that diagnosis,

⁵⁵ Tr. Vol. III at 645-46 (Patricia).

⁵⁶ JX 37.

⁵⁷ *Id.*; Tr. Vol. I at 110-11 (Patricia).

⁵⁸ Tr. Vol. II at 445-46 (Patricia).

⁵⁹ *Id.* at 503-04 (Patricia).

⁶⁰ *Id.* at 506-07 (Patricia).

Francis was admitted to the hospital on a number of occasions with various complications of the disease.⁶¹

H. Francis's estate planning

In September 2012, after his fall at Patricia's house, but before his mesothelioma diagnosis, Francis approached Patricia regarding having his will prepared at a volunteer "Mega Wills" event hosted by Delaware Volunteer Legal Services. Francis saw information about the event during a trip to the firehouse. The preliminary paperwork supplied to Francis, which Patricia filled out for him, identified Elizabeth as Francis's spouse and identified his seven children.⁶² When asked to identify any family members Francis wished to exclude from his will, the worksheet named only daughters Mary and Maggie. The worksheet listed all three of the Doughertys' properties.⁶³

Patricia drove Francis to the Mega Wills event on September 22, 2012. Neither Francis nor Elizabeth previously had engaged in estate planning. Neither Francis nor Patricia mentioned the appointment or the resulting will to Elizabeth. At the Mega Wills event, Francis met with an attorney, H. Kemp Vye, Esquire,

⁶¹ *Id.* at 508 (Patricia).

⁶² JX 6 at DVLS38. Although the photocopy that appears in the record only lists four of the seven children, there is a direction to "continue [listing living children] on the back of this page if necessary" and a handwritten notation that states "OVER." Because the will identifies all Francis's children, I conclude that the original worksheet listed the remaining children on the back of the page.

⁶³ *Id.* at DVLS39.

who had volunteered his time to prepare wills for participants.⁶⁴ Vye testified he met with Francis for approximately 45 minutes, both in Patricia's presence and alone.⁶⁵ Vye concluded Francis seemed "fine," but Vye reached that conclusion without realizing – through no fault of his own – certain facts regarding Francis, his wife and children, and his assets.

Vye based his opinion regarding Francis's mental capacity on his ability to converse appropriately in ordinary conversation during their introductory meeting. Vye did not notice anything unusual about Francis, but acknowledged that his conclusions were subjective and necessarily limited by the nature of the event.⁶⁶ Unaware that Francis previously had been diagnosed with dementia, Vye asked Francis no particular questions intended to delve into his competency.⁶⁷

The will Vye prepared for Francis (the "Will") left his estate to Patricia and Frannie, to the exclusion of Elizabeth and their five children. Everyone agrees, even Patricia, that this result was inconsistent with Francis's expressed intent to

⁶⁴ It goes without saying, but must nonetheless be said, that Vye's willingness to volunteer is admirable and his efforts on that day, as well as the efforts of the other volunteer attorneys at the event, undoubtedly helped many people. These periodic volunteer events to assist seniors with estate planning provide an important service to members of the community. The fact that Vye was not aware of certain facts that would have prompted him to refuse to prepare Francis's will is neither an indictment of Vye's skill as an attorney nor a suggestion that these events are flawed in any respect. One isolated case of a testator succumbing to subtle undue influence should not serve as a basis for attorneys to refrain from offering pro bono services in a similar manner.

⁶⁵ Tr. Vol. II at 373, 381 (Vye).

⁶⁶ *Id.* at 365, 74 (Vye).

⁶⁷ *Id.* at 371 (Vye).

leave his estate to Betty Ann, who was disabled, and to Cathy.⁶⁸ Contrary to that intent, Francis's Will attempted to leave the Beach Cottage and 2036 Marsh to Patricia, or to Frannie if Patricia failed to survive Francis.⁶⁹ The Will similarly left the residue of Francis's estate to Patricia and Frannie in equal shares. Francis appointed Patricia as his executor. He made no provision for Elizabeth or for his other five children. The Will expressly referenced his intent to disinherit Mary and Maggie, but made no mention of disinheriting the other children, not to mention Elizabeth. The Will did not mention 710 Phillips.

Vye testified at trial that, had he been aware of certain facts on September 22, 2012, he would not have prepared a will for Francis to sign on that day.⁷⁰ First, and most fundamentally, Vye believed – based on information provided to him by Francis and Patricia – that Elizabeth was deceased.⁷¹ Vye was unequivocal in his testimony on this point.⁷² He stated that he is certain of this fact because he would not have prepared a will for Francis without asking him about his wife and “her status.”⁷³ Vye also testified that, had he been preparing a will for someone who intended to disinherit his wife, he would have included that fact specifically in the

⁶⁸ *Id.* at 95-96 (Patricia).

⁶⁹ JX 35.

⁷⁰ Tr. Vol. II at 365-66, 369, 375 (Vye).

⁷¹ *Id.* at 333, 337-38 (Vye).

⁷² *Id.* at 336, 338, 365-67, 377 (Vye).

⁷³ *Id.* at 339 (Vye).

text of the will. Vye stated he strongly would have urged Francis not to sign a will that day had such a disinheritance been his intent.⁷⁴

Vye similarly testified that, had he known that the properties Francis attempted to devise in the will – the Beach Cottage and 2036 Marsh – were not properties in which he had a devisable interest, Vye would not have proceeded with preparing a will for Francis.⁷⁵ Finally, Vye testified that Patricia was present at the table when he reviewed with Francis his heirs and property and that Patricia confirmed Francis’s statements were accurate.⁷⁶ Vye was not aware that Patricia, rather than Francis, also had filled out the pre-meeting worksheet. Vye testified that, had he known that fact, he would have been concerned about possible undue influence.⁷⁷ In sum, Vye testified that he likely would not have prepared a will for Francis on that day, and he certainly would have written the will differently, had he been aware of these facts.

That same day, Francis also executed an advanced health care directive and power of attorney. He left the Mega Wills event with all three documents in his possession.⁷⁸ He later turned the Will over to Patricia in the early fall of 2013, indicating she was the most responsible of the children.⁷⁹

⁷⁴ *Id.* at 339 (Vye).

⁷⁵ *Id.* at 369-70 (Vye).

⁷⁶ *Id.* at 373 (Vye).

⁷⁷ *Id.* at 374 (Vye).

⁷⁸ *Id.* at 502-03 (Patricia).

⁷⁹ *Id.* at 510 (Patricia).

In addition to being named as his beneficiary under the Will, Patricia also was the beneficiary of Francis's two life insurance policies: a GEMGroup policy that paid a \$10,000 death benefit and a Standard Life Insurance Company policy that paid a \$25,000 benefit. Francis designated Patricia as the beneficiary of the GEMGroup policy at some point after he moved into her home in Kennett Square, but there is very little testimony or record evidence regarding this policy.

Francis designated Patricia as the beneficiary of the Standard policy shortly before his death. According to Mr. Perillo, this policy was a relatively new benefit provided by the fire company. Mr. Perillo brought a beneficiary designation form to Francis at Francis's request, asked Francis whom he wanted to be the beneficiary, and then asked Patricia to fill out the form in accordance with Francis's direction.⁸⁰ Francis signed the form in Mr. Perillo's presence, and Mr. Perillo then took possession of the form.⁸¹ Notably, despite specifically being asked, Patricia never disclosed in discovery this policy's existence.⁸²

⁸⁰ Tr. Vol. III at 597-98 (Perillo).

⁸¹ *Id.* at 598 (Perillo).

⁸² Tr. Vol. I at 89-90 (Patricia).

I. Expert opinion of Samuel Romirowsky, Ph.D.

In support of her petition to review Francis's Will, Elizabeth offered the opinion and testimony of Samuel Romirowsky, Ph.D. ("Dr. Romirowsky"), who opined that Francis lacked testamentary capacity and was a susceptible testator when he executed his Will on September 22, 2012.⁸³ To reach his conclusions, Dr. Romirowsky reviewed Francis's medical records, particularly those records indicating he was experiencing memory difficulties, was diagnosed with mild dementia, and had "small vessel ischemia," which decreases blood flow and may result in injury to the brain.⁸⁴ Dr. Romirowsky also interviewed Elizabeth and Mary and reviewed the depositions of Patricia and Mr. Vye.

Dr. Romirowsky reasoned that Francis lacked capacity because: (1) he was dependent on Patricia for both his physical care and the management of his finances in the two and a half years before his death; (2) he was diagnosed with dementia, which is a progressive disease causing mental decline; and (3) on the day he executed the Will, he incorrectly believed that his wife was deceased and that he solely owned certain properties.⁸⁵ Dr. Romirowsky likewise concluded that Francis was a susceptible testator because he was dependent on Patricia, who

⁸³ JX 21 at 6.

⁸⁴ *Id.* at 2-6.

⁸⁵ *Id.* at 3-5.

isolated him from his wife and other children, and easily was confused and influenced as a result of his mental decline and memory issues.⁸⁶

Patricia criticizes Dr. Romirowsky's conclusions as based on unreliable information, namely incorrect information provided by Elizabeth and Mary. In particular, Patricia notes that Mary did not see her father in the years leading up to his death and therefore could not have provided any reliable information about Francis's mental condition or about Patricia's actions relating to her father. Patricia further points out that Dr. Romirowsky presumed that Francis's memory problems and dementia progressively got worse, but that he can point to no contemporaneous medical records supporting that presumption. Patricia contends Dr. Romirowsky mischaracterized Mr. Vye's testimony as referencing Francis's "severe confusion" on the day he executed the Will, when in fact Mr. Vye never testified in that manner.

J. Francis's death and the aftermath

Francis remained hospitalized in the last weeks of his life and ultimately died on November 7, 2013.⁸⁷ On December 4, 2013, Patricia filed the Will with the New Castle County Register of Wills. Letters testamentary were granted to Patricia on December 16, 2013. Until the Will was filed with the Register of Wills, neither Elizabeth nor Francis's other children were aware of it. Because 710

⁸⁶ *Id.* at 5-6.

⁸⁷ Tr. Vol. I at 87 (Patricia).

Phillips and 2036 Marsh passed to Elizabeth by operation of law, and because it appears Francis had no identifiable interest in the Beach Cottage, the most significant asset in the estate is a wrongful death claim relating to Francis's mesothelioma.

In December 2013, Patricia covertly undertook "estate planning" for Elizabeth. I conclude Patricia likely did this because she realized at that point that Francis's Will was ineffective in devising the real property to her. Using funds, Patricia retained counsel, who drafted an irrevocable trust on Elizabeth's behalf, naming Patricia as trustee and Patricia and Frannie as residuary beneficiaries (the "Trust").⁸⁸ Patricia intended to transfer all the Doughertys' real estate (which now belonged solely to Elizabeth) into the Trust.⁸⁹ It was very clear during trial that, having worked to restore the properties, Patricia was loath to cede control of them to Elizabeth. Under the terms of the Trust, the corpus would be held for Elizabeth during her lifetime, but controlled by the trustee, Patricia. Upon Elizabeth's death, the properties were to pass to Patricia and Frannie in equal shares.⁹⁰

Neither counsel nor Patricia consulted with Elizabeth about her desire to execute the Trust, let alone about who she wished to name as its beneficiaries. Patricia testified she engaged in this conduct, which seems a fairly clear breach of

⁸⁸ JX 38; Tr. Vol. I at 106-07, 111, 116 (Patricia).

⁸⁹ Tr. Vol. I at 108-09 (Patricia).

⁹⁰ JX 38.

her duties as power of attorney, in order to effectuate her father's intent in his Will.⁹¹ In other words, Patricia realized at this point that the Will was not effective in transferring the properties to her, and so she sought to execute the Trust to obtain that end through other means. In her post-trial brief, Patricia altered her explanation of the Trust's purpose, arguing that it was done merely to plan for her mother's elder care.⁹² That explanation, which contradicts her sworn testimony, is unpersuasive, as it fails to account for the fact that Patricia also named herself as residuary beneficiary of the Trust, a result she almost certainly knew was not her mother's intent.

The Trust never became effective because Elizabeth revoked the power of attorney before the properties were transferred to the Trust. Its existence, however, is strong evidence of Patricia's motives, as well as her willingness to act covertly to achieve her ends.

Elizabeth filed this action on May 23, 2014, seeking review of the Will. In her petition, Elizabeth alleges the Will was invalid because Francis lacked testamentary capacity or was unduly influenced by Patricia when he executed it. Elizabeth also seeks Patricia's removal as executrix of Francis's estate as well as an accounting from Patricia for her expenditures of the Doughertys' funds. Finally, in the event the Will is upheld as valid, Elizabeth seeks her elective share

⁹¹ Tr. Vol. I at 109-110 (Patricia).

⁹² Patricia Post-Tr. Br. at 16-17.

of the estate under Delaware law. An amended petition filed in June 2015 also alleges Patricia unduly influenced Francis to change the beneficiary designations on the life insurance policies.

ANALYSIS

Delaware law disfavors invalidating a testamentary plan and this Court therefore presumes that a will is valid, that a testator possessed testamentary capacity at the time he executed a will, and that the will was not the product of undue influence.⁹³ For that reason, the party challenging a will ordinarily bears the burden of proof by a preponderance of the evidence.⁹⁴ Proof by a preponderance of the evidence “means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not.”⁹⁵

I. Patricia unduly influenced Francis to make the Will and designate Patricia as beneficiary of the life insurance.

Under Delaware law, undue influence is

an excessive or inordinate influence considering the circumstances of the particular case. The degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to compel him to make a will that speaks the mind of another and not his own. It is immaterial how

⁹³ *In re Estate of West*, 522 A.2d 1256, 1263, 1265 (Del. 1987).

⁹⁴ *Id.* at 1263; *In re Estate of Justison*, 2005 WL 217035, at *6-7 (Del. Ch. Jan. 24, 2005).

⁹⁵ *Mitchell Lane Publ'rs, Inc. v. Rasemas*, 2014 WL 4925150, at *3 (Del. Ch. Sept. 30, 2014) (quoting *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *6 (Del. Ch. May 18, 2009)).

this is done, whether by solicitation, importunity, flattery, putting in fear or some other manner. Whatever the means employed, however, the undue influence must have been in operation upon the mind of the testator at the time of the execution of the will.⁹⁶

Unfair persuasion is the “hallmark” of undue influence.⁹⁷ A party challenging a will must prove the five elements of undue influence by a preponderance of the evidence. Those elements are: “(1) a susceptible testator; (2) the opportunity to exert influence; (3) a disposition to do so for an improper purpose; (4) the actual exertion of such influence; and, (5) a result demonstrating its effect.”⁹⁸

Elizabeth contends she established by a preponderance of the evidence that Patricia unduly influenced Francis to execute the Will, pointing to the control Patricia wielded over Francis’s care and finances in the last two and a half years of his life, Patricia’s hatred of her mother, Patricia’s statements suggesting to Francis that Elizabeth was abusive of him, the lengthy and regular stretches of time Patricia spent exclusively with Francis, and her presence when Francis consulted counsel and executed the Will, including when he mis-identified his property and indicated his wife was deceased.

⁹⁶ *In re Estate of West*, 522 A.2d at 1264 (quoting *In re Will of Langmeier*, 466 A.2d 386, 403 (Del. Ch. 1983)).

⁹⁷ *Mitchell v. Reynolds*, 2009 WL 132881, at *8 (Del. Ch. Jan. 7, 2009).

⁹⁸ *In re Estate of West*, 522 A.2d at 1264; *In re Will of Cauffiel*, 2009 WL 5247495, at *7 (Del. Ch. Dec. 31, 2009); *In re Will of Langmeier*, 466 A.2d at 403.

Patricia, on the other hand, argues Elizabeth has not met her burden of proof,⁹⁹ pointing out that Patricia merely stepped forward as a concerned child to assist her parents, and that no ill-motive can be suggested by her assistance. Patricia also points out that Mr. Vye met with Francis both in Patricia's presence and alone and that Francis's statements did not change when Patricia left earshot. Patricia also relies on Mr. Perillo's testimony that Francis wanted to divorce Elizabeth and wanted Patricia to be the beneficiary of his life insurance. Finally, Patricia argues that Mr. Perillo and several of Patricia's neighbors testified to Francis's sharp mental state, suggesting he was not a susceptible testator.

In my view, Elizabeth established each of the five elements of undue influence by a preponderance of the evidence. First, there can be little doubt that Francis was a susceptible testator. There is no precise definition or defining feature of susceptibility, but the analysis is informed by the subject's capacity and does not require an advanced degree of debilitation.¹⁰⁰ Evidence of a subject's dependence on another, or a particular predisposition to accede to the demands of another person, may be sufficient to show susceptibility.¹⁰¹ Here, the record is clear that Francis was dependent on Patricia both for the management of his

⁹⁹ Articulating Patricia's argument is somewhat difficult because the post-trial briefs she submitted took the position that Elizabeth was required to prove undue influence by clear and convincing evidence, a standard Patricia now concedes was an incorrect statement of the law.

¹⁰⁰ *Reynolds*, 2009 WL 132881, at * 9; *In re Will of Wiltbank*, 2005 WL 2810725, at *5 (Del. Ch. Oct. 18, 2005).

¹⁰¹ *Reynolds*, 2009 WL 132881, at * 9.

finances as well as his housing and personal care. As he no longer drove, he relied on Patricia for daily rides to visit his beloved fire hall. Patricia acknowledged caring for her parents, especially Francis, was a “24-7” job.¹⁰² The living conditions in which Francis was found in March 2011, coupled with his mild dementia and memory issues, further indicate he was susceptible to possible influence. In fact, if one accepts the Respondent’s theory of the case, which is that Francis was living in the deplorable conditions at 710 Phillips because he was unable to stand up to Elizabeth, who managed the household and most of the finances, it follows that when Patricia assumed that role of caretaker in his life, Francis likely would have found it difficult to stand up to her, particularly since she painted herself as the only person standing between her parents’ (1) return to living in squalor at 710 Phillips or (2) becoming wards of New Castle County.

Second, Patricia largely concedes that she had the opportunity to exert influence over Francis, and the evidence also supports that conclusion.¹⁰³ In addition to living in Patricia’s home, Francis would ride with Patricia almost every day to either 710 Phillips or the Beach Cottage to oversee the work there and typically would join her for lunch on those days, even if he visited the fire hall after they arrived at 710 Phillips.

¹⁰² Tr. Vol. I at 26 (Patricia).

¹⁰³ Estate Post-Tr. Br. at 39.

Elizabeth also demonstrated that Patricia had a disposition to exert influence over her father for an improper purpose. Patricia's finances were stretched when she took custody of her parents in March 2011; her savings account was depleted in the preceding few years, she was unemployed, and she largely relied on her estranged husband to pay her bills. Patricia also harbored a deep-seated dislike for her mother, which was palpable at the time of trial. Patricia viewed her mother as abusive, while considering her father the victim of that abuse. Without in any way acknowledging her mother's psychological issues with hoarding and obsessive behaviors, Patricia assigned to Elizabeth sole responsibility for the state of 710 Phillips.

At trial, Patricia criticized her mother as being ungrateful and unappreciative of the efforts made to restore her properties. Patricia's anger at her mother, her belief that her mother was responsible for the deplorable conditions in which Elizabeth and Francis were living, and her view that she "saved" her father from this abusive relationship all demonstrate her disposition to exert undue influence over Francis. Moreover, Patricia demonstrated her disposition to act improperly to achieve her ends when she covertly attempted to establish an irrevocable trust on Elizabeth's behalf, using the power of attorney Elizabeth granted and naming herself as trustee and beneficiary in an effort to subvert Elizabeth's testamentary plan.

The fourth element of undue influence, actual exertion of such influence, rarely is proven with direct evidence because “[p]ersons who unduly influence a testator to change his or her will normally do that surreptitiously.”¹⁰⁴ Here, the circumstantial evidence strongly suggests Patricia actually exerted influence over Francis. She concedes that the Will he executed in September 2012 was contrary to his expressed intent to arrange his affairs so that Betty Ann and Cathy were taken care of when he died. Francis never indicated to anyone that he changed that intent, nor is there anything in the record to suggest why he would have done so by his own volition. Again, Patricia’s efforts after Francis’s death to obtain control of the real estate by surreptitiously using Elizabeth’s power of attorney also are evidence that Patricia was intent on ensuring Elizabeth did not regain control of the properties and that she likely pressed her father to accept that view. In addition to that circumstantial evidence, there is direct evidence, through Patricia’s own testimony, that she suggested to Francis that he should divorce Elizabeth and that she remarked in Francis’s presence that Elizabeth was abusive to him. In Francis’s vulnerable state, those remarks – coupled with other pressure from Patricia, of which there only is circumstantial evidence – would have been sufficient to subjugate his will to Patricia’s.

¹⁰⁴ *In re Estate of Konopka*, 1988 WL 62915, at *5 (Del. Ch. Jun. 17, 1988).

Finally, both the Will Francis executed in September 2012 and the Standard Life Insurance policy he executed shortly before his death are results demonstrating the effect of Patricia's undue influence. The cumulative effect of those actions was to cause Francis to leave nothing to either his wife of sixty years or most of his children, including the disabled child he expressly indicated he intended to care for through his estate. The Will also incorrectly identifies Francis's interest in real estate. In other words, Patricia's influence caused Francis to implement an estate plan that neither effectively identified his assets nor disposed of them in the manner he intended.

To summarize, Elizabeth demonstrated by a preponderance of the evidence that Patricia exerted excessive influence over Francis, both by (1) appealing to his gratitude toward her and his sense that he was beholden to her for care and the management of his finances, and (2) poisoning his mind toward Elizabeth by characterizing her as abusive and the source of the couple's difficult circumstances, at a time when Francis was susceptible to Patricia's influence. Patricia did so to obtain control over the Doughertys' properties, which she believed could not be permitted to fall into Elizabeth's hands.

Having concluded that the Will is invalid as a result of undue influence, I need not reach the question of testamentary capacity. Because the Will is invalid, Patricia no longer is entitled to serve as executrix of the estate. The question of

who is eligible to serve as administrator of Francis's estate is a question that must be addressed to the Register of Wills in the first instance.

Francis's designation of Patricia as beneficiary of the Standard Life Insurance policy also is invalid as the product of undue influence. Francis did this shortly before his death, at a time when I already concluded he was susceptible, and had succumbed, to Patricia's undue influence. In contrast, however, Elizabeth has not shown that Patricia exerted undue influence over Francis when he executed the GEMGroup policy. The record suggests Francis did this shortly after he moved to Patricia's home. There is no other evidence regarding the circumstances of this designation. Elizabeth has not carried her burden of proving this designation was the product of undue influence.

II. Elizabeth is entitled to an accounting.

Elizabeth also seeks an accounting from Patricia of the expenditures Patricia made or authorized from the Doughertys' accounts, including their joint bank account and the line of credit. Delaware law entitles Elizabeth to such an accounting. Patricia acted as a fiduciary to her parents when they allowed her to access the joint bank account and the line of credit to make expenditures on their behalf.¹⁰⁵ After the powers of attorney were executed, Patricia formally was a

¹⁰⁵ See, e.g. *Seiden v. Kaneko*, 2015 WL 7289338, at *11 (Del. Ch. Nov. 3, 2015) (finding a director remained a fiduciary of the company after resigning due to his continued access to and use of bank accounts); *In re Estate of Dean*, 2014 WL 4628584, at *2 (Del. Ch. Sept. 17, 2014)

fiduciary and obligated by statute to account for her actions.¹⁰⁶ Patricia concedes Elizabeth is entitled to an accounting, but contends she has provided the “best accounting possible” by writing “a narrative of her life and actions after March 28, 2011 and the efforts she undertook regarding her parents’ properties” and by answering Elizabeth’s questions during her deposition.¹⁰⁷ Patricia argues any further accounting is impossible because the notebook in which she logged all her expenditures was left at 710 Phillips, and Elizabeth now has possession of that property.

Patricia’s arguments are not compelling. Although she concedes Elizabeth legally is entitled to an accounting, she made no effort to obtain bank records or copies of receipts or bills from the relevant entities or individuals. She offered no other evidence, such as affidavits from persons she claims to have paid in cash. Patricia cannot excuse her own failure to maintain records in a safe place, nor can she rely on a “narrative” and answers to deposition questions as a substitute for a formal accounting. Patricia is required to provide a formal accounting to Elizabeth from March 28, 2011 until the date the power of attorney was revoked, documenting the expenditures Patricia made using the Doughertys’ funds.¹⁰⁸

(holding that a person designated as signatory on bank accounts for the account-holder’s convenience acted as a common-law fiduciary).

¹⁰⁶ 12 *Del. C.* § 49A-116(a)(3).

¹⁰⁷ Patricia Post-Tr. Br. at 35.

¹⁰⁸ Patricia argues that any claim for damages Elizabeth may have should be set-off against the value of services Patricia rendered to Elizabeth. This argument is premature, as any question of

CONCLUSION

For the foregoing reasons, I conclude that Patricia unduly influenced Francis to execute the Will and the Standard Life Insurance policy beneficiary designation. The Will and that designation therefore are **VOID**, and Francis's estate **SHALL** be distributed pursuant to the law of intestacy. Patricia **SHALL** provide a formal accounting of her expenditures from the Doughertys' joint account and the line of credit after March 28, 2011. That accounting **SHALL** be prepared and transmitted to Elizabeth's counsel within four months of the date of this Opinion. Petitioner's counsel **SHALL** prepare and file a proposed form of order consistent with this Opinion. If Respondent's counsel has any objection to that form of order, they **SHALL** so notify the Court by letter within three business days of its filing.

IT IS SO ORDERED.

damages must await the accounting and reconciliation of the expenditures Patricia made. Similarly, the question of whether Patricia comes to the Court with unclean hands, such that she cannot advance an equitable claim for a set-off, also is not ripe for resolution until the accounting is provided.